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No. 00-1514

In the

Supreme Court of the United States

LANCE RAYGOR AND JAMES GOODCHILD,
Petitioners,

v.

REGENTS OF THE UNIVERSITY OF MINNESOTA,
Respondent.

On Writ of Certiorari
To the Minnesota Supreme Court

BRIEF OF THE STATES OF MARYLAND, ALASKA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, INDIANA, IOWA, LOUISIANA, MASSACHUSETTS, MISSISSIPPI, MISSOURI, NEBRASKA, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TEXAS, UTAH, VERMONT, AND VIRGINIA, AND THE TERRITORY OF GUAM, AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether 28 U.S.C. § 1367(d)—which tolls the statutes of limitations applicable to supplemental State-law claims while those claims are pending in federal court—unconstitutionally infringes on the States' sovereign immunity when imposed on State defendants.

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INTEREST OF THE AMICI CURIAE

The amici States have a specific and a general interest in the resolution of this case. Many plaintiffs include supplemental State-law claims in federal actions brought against States. When those supplemental claims are dismissed without prejudice, the plaintiffs often respond by asserting them in a newly-filed State court action. Whether the limitations periods have expired on those claims will often depend upon whether 28 U.S.C. §1367(d) applies. Accordingly, the outcome of this case will affect the outcome of actions filed against States throughout the country.

The principles governing the disposition of this case have implications that go well beyond the supplemental jurisdiction statute. States have imposed numerous conditions—apart from limitations periods—on the waivers of their sovereign immunity. Some States have placed caps on the amount of damage awards they can be forced to pay; other States have channeled actions against them to specific tribunals which follow specific procedures. The amici States have a strong interest in protecting the conditions placed on their waivers from congressional abrogation.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is whether Congress can modify the conditions placed by a State on the waiver of its sovereign immunity. The State of Minnesota imposed restrictions when it agreed to waive its sovereign immunity to employment discrimination claims brought under the Minnesota Human Rights Act (MHRA). One such restriction confines MHRA actions to State, not federal, court. See Minn. Stat.

§363.14, subd. 2 (2000). Another restriction is the statute of limitations, which requires plaintiffs to file their claims in State court within 45 days of receiving notice that the Minnesota Department of Human Rights has dismissed the claims. See Minn. Stat. §363.14, subd. 1(a)(1) (2000). Just as Congress cannot altogether abrogate Minnesota's immunity from State-law claims in State court, it cannot modify the terms of Minnesota's waiver of that immunity. The tolling provision of the supplemental jurisdiction statute, 28 U.S.C. §1367(d), does precisely that. It is therefore unconstitutional as applied to Minnesota in this case, and when imposed on any other State that has waived its immunity conditioned on a specific limitations period.[1]

1. The Constitution prohibits Congress, when acting pursuant to its Article I powers, from abrogating the States' sovereign immunity. States may, however, waive their immunity by consenting to suit. Concomitant with the States' power to waive their immunity is their power to set the conditions and terms by which they can be sued. Those conditions and terms establish the boundaries of the States' waivers; their constitutionally-grounded immunity fully obtains outside those boundaries. A long line of decisions by this Court—addressing the sovereign immunity of both the States and the United States—confirms this principle. It necessarily follows that a federal law purporting to modify the conditions imposed by States

[1] This brief addresses only the question presented in the petition for certiorari. We therefore do not address issues of statutory construction or whether §1367(d) is unconstitutional even when applied to suits among private parties.

on their waivers of immunity is unconstitutional, for it would subject States to suit in a manner or to an extent to which they have not consented.

2. The States have imposed an array of conditions on their waivers of immunity. Among them are limitations on compensatory and punitive damage awards, the use of special tribunals to hear actions, notice-of-claim requirements, and statutes of limitations. These conditions serve the same core interests served by sovereign immunity generally—protecting the public fisc and preserving State autonomy. If Congress were permitted to modify the conditions imposed by States on their waivers, the intrusion on State sovereignty would be as direct and severe as complete abrogation of the States' sovereign immunity.

3. When imposed on non-consenting States, §1367(d) runs afoul of these principles. This Court has held that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity." *Block v. North Dakota*, 461 U.S. 273, 287 (1983). Section 1367(d) modifies that condition by extending the limitations period for the many months or years during which a supplemental claim against a State is pending in federal court. The provision is therefore an unconstitutional abrogation when imposed on State defendants.

4. Through the MHRA, the State of Minnesota waived its immunity to private age-discrimination actions brought under State law. That waiver is conditioned on a 45-day limitations period which Congress cannot compel Minnesota to extend. Section

1367(d) may only apply to MHRA actions against the State, therefore, if the State has voluntarily agreed to submit to §1367(d) tolling. In the decision under review, the Minnesota Supreme Court held—as a matter of State law—that the State has not so agreed. Accordingly, §1367(d) may not, consistent with the Constitution, be applied to Petitioners' MHRA claims against the University.

5. Petitioners assert an array of fairness and public policy arguments as to why §1367(d) should apply to their claims. Each of those argument fails on principle, for concerns of fairness and public policy cannot override the States' sovereign immunity. Petitioners' arguments also fail on their own terms. As to fairness, the University did not employ any misleading or improper tactics. Indeed, nothing the University could have done would have prevented the limitations period from expiring during the pendency of Petitioners' federal action. Finally, Petitioners' contention that persons wishing to assert both federal- and State-law claims against States will be unable to do so absent §1367(d) tolling is unfounded. Plaintiffs can assert both types of claims in State court or file separate lawsuits, subject to the inevitable procedural subtleties raised by interrelated dual proceedings.

ARGUMENT

SECTION 1367(d) IS UNCONSTITUTIONAL WHEN IMPOSED ON A STATE—SUCH AS MINNESOTA—THAT HAS CONDITIONED THE WAIVER OF ITS SOVEREIGN IMMUNITY ON A STATUTE OF LIMITATIONS

A. Congress Lacks the Power to Modify the Conditions Pursuant to Which a State Has Waived Its Sovereign Immunity

1. This Court recently confirmed that Congress (except when acting pursuant to §5 of the Fourteenth Amendment) lacks the power to abrogate the States' sovereign immunity. See *Alden v. Maine*, 527 U.S. 706 (1999). Immunity from suit is one of the "attributes of sovereignty" the States possessed upon entering the Union. *Id.* at 729 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322-23 (1934)). As a consequence, "neither the Supremacy Clause nor the enumerated powers of Congress confer authority to abrogate the States' immunity from suit." *Id.* at 733. In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court applied that reasoning with respect to private suits arising under federal law brought in federal court. In *Alden*, the Court found that the "logic of the argument . . . applies with even greater force in the context of a suit prosecuted against a sovereign in its own courts, for in this setting, more than any other, sovereign immunity was long established and unquestioned." 527 U.S. at 742. Congressional abrogation of the States' immunity "in their own courts would [therefore] be even more offensive to State

sovereignty than a power to authorize [private] suits in a federal forum." *Id.* at 749. More offensive still would be congressional abrogation of the States' immunity in their own courts with respect to claims arising under State law.

A State may, of course, waive its sovereign immunity by consenting to suit. See *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883). Waiver is not, however, an all-or-nothing proposition. For example, States may consent to suit in their own courts, but not in federal courts. See *Smith v. Reeves*, 178 U.S. 436, 441-45 (1900). More generally, a State "may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Beers v. Arkansas*, 61 U.S. 527, 529 (1857). The States retain their full sovereign immunity outside the limited scope of their waiver: "The history of sovereign immunity and the practical necessity of unfettered freedom for government from crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures." *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 53-54 (1944).

The principle that the waiver of sovereign immunity may be conditioned and limited in scope has long governed waivers by the United States. In *United States v. Sherwood*, 312 U.S. 584 (1941), the Court affirmed the United States' right to channel most tort claims against it to the Court of Claims, where jury trials and injunctive relief are unavailable. Stated the Court: "The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's

jurisdiction to entertain the suit." *Id.* at 586 (citations omitted). The Court has reiterated and applied that principle on numerous occasions. See, e.g., *Lane v. Pena*, 518 U.S. 187 (1996) (the United States' waiver of its immunity to claims under §504(a) of the Rehabilitation Act was implicitly conditioned on monetary damages not being available); *Lehman v. Nakshian*, 453 U.S. 156 (1981) (the United States' waiver of its immunity from suit under the Age Discrimination in Employment Act was implicitly conditioned on plaintiffs not having the right to a jury trial). State waivers of sovereign immunity are entitled to no less respectful treatment. See *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506-07 (1998) ("this Court has recognized a correlation between sovereign immunity principles applicable to States and the Federal Government").

Accordingly, any effort by Congress to compel States to defend private actions in a manner or scope different than that set forth in the State legislation waiving the States' immunity would be an unconstitutional abrogation by Congress of the States' immunity—it would subject the States to suit in a manner and to a degree to which the States have not consented, in derogation of the States' constitutionally-grounded immunity. As the Court made clear in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 675-84 (1999), where it rejected the concept of "constructive waivers" of sovereign immunity, Congress cannot dictate the circumstances and manner by which States waive their immunity.

2. Petitioners contend the States' sovereign immunity has a more limited reach, giving States the right to decide only *whether* and *where* they could be sued. Pet. Br. 29, 31. According to Petitioners, the Framers did not "actually ha[ve] in mind" less "serious" issues (*e.g.*, tolling provisions). Pet. Br. 37, 38. Cases such as *Beers* and *Great Northern Life Insurance Company*, however, hold directly to the contrary. Petitioners do not cite those cases, let alone refute their import. It is by now firmly established that the States (and the United States) control the terms and conditions of their waivers of immunity and are entitled to establish the manner in which they may be sued. As to the Framers' thoughts, Petitioners apply an absurdly specific level of generality. The Framers "had in mind" the principle that the States' sovereign immunity would be preserved. That principle does not become inapplicable whenever Congress attempts to abrogate that immunity through legislation addressing issues the Framers had not specifically discussed or contemplated.

Perhaps recognizing this, Petitioners acknowledge that "[a] more substantial constitutional question might arise if the Minnesota legislature, in authorizing actions against the state under the Minnesota Human Rights Act, had expressly provided that that waiver of sovereign immunity was conditioned on a bar to any tolling of the statute of limitations. But the waiver of the state's immunity contains no such specific limitations." Pet. Br. 38-39. Whether Minnesota, in the MHRA, agreed to subject itself to tolling under §1367(d) is a question of State law that is addressed in Section D, *infra*. What matters for present purposes is that Petitioners essentially concede that Congress may

not abrogate a condition placed by a State on the waiver of its immunity.

B. The States Have "Exercised a Privilege of Sovereignty" by Placing a Variety of Conditions Upon the Waivers of Their Immunity

1. In *Alden*, the Court observed that private money damages suits against non-consenting States "may threaten the financial integrity of the States" and impose "substantial costs to the autonomy, the decisionmaking ability, and the sovereign capacity of the States." 527 U.S. at 750. These same interests would be threatened were States subjected to private suits in a manner or scope different than that to which they have consented. A closer look at some of the common conditions placed on States' waivers of their immunity confirms that Congress's lack of power to modify those conditions does not represent an extension of *Alden*; it represents a straightforward application of that decision.

A common condition States have imposed on the waiver of their immunity is limiting the amount of compensatory and punitive damages that may be recovered in actions against them.[2] Thus, for example, the maximum monetary recovery a plaintiff can obtain against the State of Missouri for a tort committed by

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[2] See 1 *Civil Actions Against State and Local Government* §6.12, at 489-93 (Shepard's eds., 2d ed. 1992) ("*Civil Actions*") (listing State statutes placing caps on compensatory damage awards against States); §6.10, at 479-83 (listing State statutes barring punitive damage awards against States).

that State is $2,000,000 in compensatory damages and no punitive damages. Mo. Rev. Stat. §537.610(2), (3) (2000). The fiscal impact of a federal statute lifting those limits would be considerable.

Though they have a less direct impact on the State fisc, other conditions on immunity waivers are also grounded in important State interests. For example, some States follow the models of the Federal Tort Claims Act and Tucker Act by channeling tort and contract actions against the State to a State court of claims.[3] And just as the federal Court of Claims adheres to procedures different than those guiding district courts, State courts of claims often follow special procedures designed to accommodate the States' particular interests. In New York, for example, tort claims against the State are heard only in the New York Court of Claims, by a judge not a jury, subject to a six-month statute of limitations, with strict notice-of-claim requirements. N.Y. Ct. Cl. Act §§8, 10-12 (McKinney 1989 & Supp. 2001). Many States that do not use courts of claims also impose strict limitations periods and notice-of-claim requirements on actions brought against the State.[4]

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[3] See 1 *Civil Actions* §§3.7, 3.8, at 196-99 (listing State statutes channeling tort actions against States to courts of claims or special tribunals); James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After Seminole Tribe*, 46 UCLA L. Rev. 161, 205 n.166 (1998) (listing State statutes assigning contract claims against States to courts of claims).

[4] 1 *Civil Actions* §5.1, at 334-37 (listing State statutes imposing notice-of-claim requirements on tort claims against States); §6.4, at 456-59 (listing State statutes imposing limitations periods on tort claims against States).

These conditions on waivers serve a variety of policy objectives. Requiring that claims against the State be heard by a judge, rather than a jury, expedites trials and reflects the concern that "juries 'might tend to be overly generous because of the virtually unlimited ability of the Government to pay the verdict.'" *Nakshian*, 453 U.S. at 161 n.8 (quoting H.R. Rep. No. 659, 83d Cong., 1st Sess. 3 (1953)). Limitations periods provide repose and "protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence." *United States v. Kubrick*, 444 U.S. 111, 117 (1979). Finally, notice-of-claim provisions "ensure that public officials will receive prompt notice of wrongful conditions or practices, and thus enable[ ] them to take prompt corrective action." *Felder v. Casey*, 487 U.S. 131, 157 (1988) (O'Connor, J., dissenting). These provisions also "enable[ ] officials to investigate claims in a timely fashion, thereby making it easier to ascertain the facts accurately and to settle meritorious claims without litigation." *Id.*

Were Congress permitted to undo these conditions on the States' waivers of their immunity, the nature of the intrusion on the States' sovereign interests would be precisely the same as if Congress altogether abrogated the States' immunity. In *Alden*, this Court observed that, "[t]o the extent Maine has chosen to consent to certain classes of suits while maintaining its immunity from others, it has done no more than exercise a privilege of sovereignty concomitant to its constitutional immunity from suit." 527 U.S. at 758. Virtually every State has "exercise[d] a privilege of sovereignty" by only partially waiving its immunity to suits in its own courts. To the extent the States have

retained their immunity by conditioning their waivers, they are entitled to the same protection from congressional intrusion that Maine received in *Alden*.

2. Petitioners have questioned (Br. 37) whether every federal statute that in any way "affect[s] the liability" of a State invokes the anti-abrogation rule. Undoubtedly, the answer is no. As this Court recognized in a different context, "[r]eally, universally, relations stop nowhere." *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (citation omitted). Some federal statutes may affect a State's liability in too "tenuous, remote, or peripheral" a way, *id.* at 661 (citation omitted), to justify invocation of the rule. This case, however, does not present any difficult questions in that regard. A federal statute that, through its direct operation, modifies one of the conditions discussed above—by, for example, lifting caps on damage awards that can be imposed against States —will always have the requisite directness. As discussed in Section C, *infra*, §1367(d) is just such a provision.

Petitioners also question whether States can condition their waivers of immunity on federal courts applying procedures at variance with the Federal Rules of Civil Procedure or local practice. Pet. Br. 39 & n.50. That is an issue for another day. Section 1367(d) operates by extending the limitations periods of cases filed in State court. It does not dictate how cases in federal court are to proceed.

C. Imposing §1367(d) on a State Defendant Unconstitutionally Abrogates a Condition the State Placed on the Waiver of its Immunity

1. Prior to 1990, federal courts often faced a dilemma after they dismissed a federal claim to which supplemental claims had been appended. On the one hand, state courts were the more appropriate tribunals to hear the supplemental claims. On the other hand, the statute of limitations on filing a state court action often had run during the pendency of the federal action. Dismissing the supplemental claims would mean those claims were lost. Federal courts responded to this situation in varying ways, some holding that it would be an abuse of discretion to dismiss a supplemental claim that would be time-barred in state court, others upholding the discretionary dismissal of such claims. Congress included §1367(d) in the supplemental jurisdiction statute to resolve that complication. See generally Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis*, 24 Ariz. St. L.J. 849, 982-84 (1992).

Section 1367(d) provides:

> The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

For purposes of this brief, we assume Congress intended the provision to apply to actions against States and to supplemental claims dismissed on jurisdictional (as opposed to discretionary) grounds.

2. This Court has held that "[w]hen waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity." *United States v. Mottaz*, 476 U.S. 834, 841 (1986) (quoting *Block v. North Dakota*, 461 U.S. at 287). Section 1367(d) modifies that condition by extending limitations periods beyond their stated duration. See *United States v. Beggerly*, 524 U.S. 38, 49 (1998) (referring to "extension of the statutory period" caused by tolling). It is therefore an unconstitutional abrogation when imposed on State defendants. Only when a State consents to subject itself to §1367(d) tolling may that provision apply to suits against States. Whether waiver legislation includes such consent is a question of State law, to be finally construed by the States' highest courts.[5]

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[5] Many States have "saving" statutes that "give[ ] to a plaintiff whose timely action is dismissed for procedural reasons such as improper venue a specified time in which to bring a second action." *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 431-32 & n.9 (1965) (listing 31 State saving statutes). Whether saving statutes apply to dismissed supplemental claims and to suits against States is also a matter of State, not federal, law. Compare *Roettger v. Metropolitan Gov't of Nashville and Davidson County*, 991 S.W.2d 244 (Tenn. 1999) (Tennessee saving statute does not apply to actions against governmental entities), with *Lacasse v. Burns*, 572 A.2d 357 (Conn. 1990) (Connecticut saving statute applies to suits against the State).

Apart from policy arguments (which we address in Section E, *infra*), Petitioners offer only two responses, neither of which has merit. First, Petitioners imply that a State should be deemed to waive its immunity when it does not "object[ ] invariably and at once to the assertion of supplemental claims." Pet. Br. 40. Even assuming this argument has not itself been waived, it fails. This Court recently affirmed that the "'test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one.'" *College Savings Bank*, 527 U.S. at 675 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 241 (1985)). That stringent test is not conceivably met by a State's decision to permit its attorneys to decide on a case-by-case basis whether to assert its immunity.

Second, Petitioners argue incorrectly that §1367(d) does not affect the States because the commencement of a federal action with supplemental claims puts the State on notice of those claims. See Pet. Br. 39-40 & n.51. To the contrary, §1367(d) has the direct effect of extending the time in which States may be haled into State court. As such, the provision modifies a condition placed by States on the waivers of their sovereign immunity. That alone is sufficient to invoke the anti-abrogation rule. Moreover, statutes of limitations accomplish more than ensuring defendants are provided with early notice of claims. If it were otherwise, notice-of-claim provisions would render them unnecessary. Limitations periods ensure that when a State-court action actually commences memories have not faded, witnesses have not disappeared, and the State may timely budget for its liability. Those purposes will not necessarily be served as an outgrowth of a federal action that includes claims

barred by sovereign immunity. Cf. *Hawkins v. Barney*, 30 U.S. 457, 466 (1831) ("It is not to be questioned, that laws, limiting the time of bringing suit, constitute a part of the *lex fori* of every country; they are laws for administering justice; one of the most sacred and important of sovereign rights and duties; and a restriction upon which must materially affect both legislative and judicial independence.").

D. Section 1367(d), as Applied to MHRA Actions Brought Against the State of Minnesota, is an Unconstitutional Abrogation of the State's Sovereign Immunity

It remains to apply the foregoing principles to this case. The MHRA waives the State of Minnesota's sovereign immunity by defining the term "employer" as "a person who has one or more employees," and defining the term "person" to include "the state and its departments, agencies, and political subdivisions." Minn. Stat. §363.01, subd. 17, 28 (2000); see also Pet. App. A-12. One condition of that waiver is a limitations period—the MHRA requires plaintiffs to file their claims in State court within 45 days of receiving notice that the Minnesota Department of Human Rights has dismissed the claims. See Minn. Stat. §363.14, subd. 1(a)(1). The State cannot be compelled, by force of federal law, to toll the limitations period in MHRA actions against the State. This leads to one final question: Has Minnesota voluntarily agreed to subject itself to §1367(d) tolling in MHRA suits where it is the defendant?

This State-law question has already been answered in the negative by the final arbiter of Minnesota State

law, the Minnesota Supreme Court. In the decision under review, the court held that "as defined by state law, the University's exposure to MHRA suit in this case existed only for the 45-day period following [Petitioner's] notification of dismissal of charges by the Department of Human Rights." Pet. App. A-12. Application of §1367(d) would, the court found, "expand the University's liability exposure by extending the time in which the MHRA claims can be filed in state court." *Id.* Had the State consented to §1367(d) tolling, the court could not have reached that conclusion.

The Minnesota Supreme Court's conclusion was perfectly sensible. The clearest way by which a State can agree to subject itself to §1367(d) tolling is by expressly referencing §1367(d) in its waiver legislation. To our knowledge, no State waiver statute—and certainly no Minnesota statute—does so. Alternatively, waiver legislation might expressly provide that the limitations period applicable to the State is subject to all generally-applicable tolling provisions. The MHRA does not do that either. See Pet. Br. 38 (the MHRA "says nothing about tolling one way or the other"). Finally, waiver legislation could be found implicitly to consent to §1367(d) tolling. This Court, however, has long applied the canon of construction that a waiver of immunity "will be strictly construed, in terms of its scope, in favor of the sovereign." *Lane*, 518 U.S. at 192 (United States' immunity); see also *Atascadero State Hospital*, 473 U.S. at 241 (State's immunity). That canon strongly counsels against using implication to "enlarge" the government's consent "beyond what the language requires." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (citations omitted). The Minnesota Supreme Court can hardly be faulted for

declining to find implicit consent to §1367(d) tolling in the MHRA.[6]

E. Petitioners' Policy and Equity Arguments Are Unavailing

1. The real thrust of Petitioners' brief is that barring application of §1367(d) to non-consenting State defendants would be poor public policy and unfair under the facts of this case. Respondent's brief addresses the latter concern in detail. To that discussion we add only our firm belief that the University has not employed sharp tactics or otherwise engaged in the sort of conduct about which Justice Kennedy expressed concern in *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, 393-98 (1998) (Kennedy, J., concurring). The University did not assert its Eleventh Amendment and statute-of-limitations defenses only after losing on the merits; the University did not mislead the federal district court or Petitioners by suggesting that it would waive its procedural defenses to any State-court action; and the University did not lull Petitioners into missing the 45-day limitations period. To the contrary, the University asserted its immunity from Petitioners' supplemental claims in its answer and in its first motion to dismiss.

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[6] In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 94-96 (1990), this Court ruled that federal statutes waiving the United States' sovereign immunity will be presumed to permit equitable tolling of limitations periods. That decision, however, involved the federal law question of how to construe federal statutes waiving immunity. State courts construing State waiver statutes are free to follow or ignore the example of *Irwin* (which, in any event, did not involve §1367(d) tolling).

In any event, the State limitations period expired a mere two days after Petitioners filed their complaints.

If (as we believe) Petitioners have lost their State-law claims, the fault lies not with the University, but with their failure to foresee the implications of *Seminole* on §1367(d). Some State courts may conclude that the difficulty in foreseeing the implications of *Seminole* on §1367(d) justifies equitably tolling the applicable limitations period. The Minnesota Supreme Court, however, held that the State district court did not abuse its discretion when it denied equitable tolling in this case (Pet. App. A-14 to -15), and the issue of equitable tolling is not before this Court.

2. Petitioners' public policy arguments reduce to a single proposition: without §1367(d) tolling it will be difficult for plaintiffs to assert both federal and State claims against States. That concern runs headlong into this Court's decision in *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984), in which the Court held that the Eleventh Amendment bars federal courts from hearing claims against State officials based on State law. The Court recognized that "applying the Eleventh Amendment to pendent claims [may] result[ ] in federal claims being brought in state court, or in bifurcation of claims." *Id.* at 122. The Court dismissed that concern because "such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State." *Id.* at 123.

Petitioners argue, however, that persons suing States in federal court have no choice but to include supplemental State-law claims in their federal actions and therefore no choice but to rely on §1367(d) tolling.

According to Petitioners, plaintiffs are caught in a bind: if they litigate their federal action first, the federal judgment will preclude relitigation of the related State claims in State court; yet State laws regarding claim splitting and election of remedies preclude plaintiffs from maintaining (at the same time) a federal action raising federal claims and a State action raising related State claims. Pet. Br. 13-17, 45-46. This argument—which amounts to the contention that *Pennhurst* is unworkable without §1367(d) tolling—fails on several levels.

First, and most obviously, when the Court issued its decision in *Pennhurst*, Congress was still six years away from enacting §1367(d). Denying tolling under §1367(d) to persons suing States in no way undermines the expectations of the *Pennhurst* Court. The provision (were it constitutional as applied to State defendants) might lessen the practical difficulties facing some persons suing States. But that is simply another policy consideration that, as *Pennhurst* made clear, cannot override the Eleventh Amendment.

Second, private plaintiffs have a simple solution to the dilemma posed by Petitioners: asserting their federal and State claims in one State-court action. The Court in *Pennhurst* specifically adverted to that option (465 U.S. at 122) and later explained: "That a litigant's choice of forum is reduced 'has long been understood to be a part of the tension inherent in our system of federalism.'" *Id.* at 123 (quoting *Employees v. Missouri Dep't of Public Health and Welfare*, 411 U.S. 279, 298 (1973) (Marshall, J., concurring in result)).

Third, Petitioners have overstated the procedural obstacles to bringing separate federal and State

proceedings against a State arising from the same alleged conduct. Ordinary rules regarding claim preclusion, claim splitting, and election of remedies may bar plaintiffs from bifurcating actions brought against other private entities. It is far from clear, however, that those rules would apply when States are the defendants. Only a small percentage of the decisions cited by Petitioners involved claims against States, only three of them even mentioned the Eleventh Amendment, and all but two merely applied ordinary principles of claim preclusion.[7] Petitioners have failed to show that most plaintiffs suing States will be unable to assert federal claims in federal court and, at the same time, assert State claims in State court. At most, they have shown that commentators were correct in predicting that bifurcated proceedings would pose interesting questions regarding the preclusive effect of the action that "comes to judgment first." Paul M. Bator *et al.*, *Hart and Wechsler's The Federal Courts and The Federal System* 1202 (3rd ed. 1988); see also 18 Charles Alan Wright *et al.*, *Federal Practice and Procedure* §4412, at 127 (Supp. 2001) (stating that, because of the Eleventh Amendment's

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[7] Footnote 14 of Petitioners' Brief (at p. 15) lists seven decisions in cases against State agencies, which are repeated in Appendix A to Petitioners' Brief. A handful of additional cases listed in Appendix A involved actions against State defendants. The three State cases listed in Appendix A that mentioned the Eleventh Amendment are *Hall v. State*, 756 P.2d 1048 (Haw. Ct. App. 1988), and the two Iowa cases. The two State cases in Appendix A that did not merely apply ordinary principles of claim preclusion are *Weaver v. Hood*, 577 So. 2d 440 (Ala. 1991), and *Blazer Corp. v. New Jersey Sports and Exposition Auth.*, 488 A.2d 1025 (N.J. Super. Ct. App. Div. 1985), both of which applied anti-claim splitting doctrines.

limitation on federal court jurisdiction, a federal action against a State might not have claim preclusive effect on a subsequent State court action).

Indeed, another of Petitioners' public policy arguments contradicts their assertion that plaintiffs are unable to bifurcate their claims. Petitioners contend that the federal supplemental jurisdiction scheme benefits States by giving them the option of waiving (or postponing the assertion of) their sovereign immunity defense to supplemental State law claims. States may prefer that option, suggests Petitioners, "to avoid the expense and inconvenience of having to try the federal and state claims in separate proceedings." Pet. Br. 33; see also Pet. Br. 12 (States can choose to "litigate the state and federal claims in separate actions"); Pet Br. 37 (States may agree to federal jurisdiction of State law claims "to avoid duplicative trials"). It is difficult to square that contention with Petitioners' assertion that State rules bar the splitting of actions even in cases brought against States.

In the end, we do not disagree with Petitioners that, prior to 1990, federal district courts had no easy way of addressing the situation where an underlying federal claim was dismissed, a pendent State-law claim was not yet resolved, but the State statute of limitations had run since the commencement of the federal action. Nor do we disagree that §1367(d) represents a well-intentioned effort by Congress to replace the "varied and imperfect judicial solutions" (Pet. Br. 22) that had been adopted by federal courts. The issue here, however, is whether the Constitution permits §1367(d) to be applied to actions brought against non-consenting States. It does not. The

concerns of convenience Congress sought to address cannot overcome the States' sovereign immunity.

CONCLUSION

For the foregoing reasons, the judgment of the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

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